

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

ESTEBAN HERNANDEZ,

Case No. 2:17-cv-01570-JCM-GWF

## ORDER

v.

**Petitioner,**

JO GENTRY, et al.,

## Respondents.

Petitioner Esteban Hernandez has submitted a petition for a writ of habeas corpus (ECF No. 1-1). He has paid the filing fee, and therefore his application to proceed in forma pauperis shall be denied as moot.

Petitioner indicates on the face of his petition that he challenged the same judgment of conviction in a previous habeas petition: 2:03-cv-01008-KJD-RJJ. 28 U.S.C. § 2244(3)(A) provides: “[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.” Where a petition has been dismissed with prejudice as untimely or because of procedural default, the dismissal constitutes a disposition on the merits and renders a subsequent petition second or successive for purposes of 28 U.S.C. § 2244. *McNabb v. Yates*, 576 F.3d 1028, 1029-1030 (9th Cir. 2009); *Henderson v. Lampert*, 396 F.3d 1049, 1053 (9th Cir. 2005).

1       On April 27, 2004, this court dismissed Hernandez's first petition with prejudice  
2 as procedurally barred, and judgment was entered (2:03-cv-01008-KJD-RJJ, ECF Nos.  
3 9, 10). The Ninth Circuit Court of Appeals affirmed this court's order on March 23, 2005  
4 (2:03-cv-01008-KJD-RJJ, ECF No. 16). Moreover, on June 25, 2014, this court  
5 dismissed Hernandez's second federal habeas petition as second and successive  
6 (2:12-cv-02003-JCM-PAL, ECF No. 27). This petition, therefore, is a second or  
7 successive habeas corpus petition. *Henderson v. Lampert*, 396 F.3d 1049, 1053 (9<sup>th</sup>  
8 Cir. 2005). Petitioner was required to obtain authorization from the Ninth Circuit Court  
9 of appeals before he could proceed with a second or successive petition. 28 U.S.C. §  
10 2244(b)(3). Petitioner indicates on the face of this petition that he has not received  
11 authorization from the court of appeals (ECF No. 1-1, p. 2). Accordingly, this petition  
12 shall be dismissed with prejudice as second and successive.

13       Reasonable jurists would not find this conclusion to be debatable or wrong, and  
14 the court will not issue a certificate of appealability.

15       **IT IS THEREFORE ORDERED** that the Clerk shall **DETACH** and **FILE** the  
16 petition (ECF No. 1-1).

17       **IT IS FURTHER ORDERED** that petitioner's application to proceed *in forma*  
18 *pauperis* (ECF No. 1) is **DENIED** as moot.

19       **IT IS FURTHER ORDERED** that petitioner's *ex parte* motion for appointment of  
20 counsel (ECF No. 2) and motion requesting to consolidate (ECF No. 5) are both  
21 **DENIED** as moot.

22       **IT IS FURTHER ORDERED** that the petition is **DISMISSED** with prejudice as a  
23 successive petition.

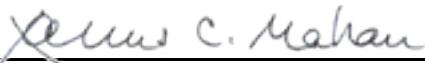
24       **IT IS FURTHER ORDERED** that a certificate of appealability is **DENIED**.

25       **IT IS FURTHER ORDERED** that the Clerk shall add Adam Paul Laxalt, Nevada  
26 Attorney General, as counsel for respondents.

1           **IT IS FURTHER ORDERED** that the Clerk shall electronically serve the petition,  
2 along with a copy of this order, on respondents. No response by respondents is  
3 necessary.

4           **IT IS FURTHER ORDERED** that the Clerk shall **ENTER JUDGMENT** accordingly  
5 and close this case.

6  
7  
8           DATED: 9 November 2017.

9             
10           JAMES C. MAHAN  
11           UNITED STATES DISTRICT JUDGE